IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-232

FRED VIGORITO, ALEXANDER NOCE, AND DIEGO ASARO,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

GUSTAVE H. NEWMAN
Attorney for Petitioners
522 Fifth Avenue
New York, New York 10036
Telephone: (212) MU 2-4066

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-232

FRED VIGORITO, ALEXANDER NOCE, AND
DIEGO ASARO,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF

Statement of the Case

This brief is submitted in reply to the Government's Memorandum in opposition to our Petition for Certiorari. It is directed toward the arguments raised by the Government in opposition to Point II of our Petition, i.e., the issue of the application of Rule 41(e) as a basis for a pre-indictment motion to suppress.

Rebuttal

The Government's Memorandum seeks to rebut our contention on two grounds: (1) on the authority of *Bova* v. *U. S.*, 460 F2d 404 (2d Cir. 1972) and (2) on the grounds of *U. S.* v. *Calandra*, 414 U.S. 338.

The reliance on *Bova* (*supra*) is misplaced for examination of that case indicates that the language of Judge Friendly concerning the issue at bar was dicta. More importantly, however, that language flies in the face of several contrary decisions, one of which emanates from the Second Circuit—*In Re Fried*, 161 F2d 453 (2 Cir. 1947). In *Fried* (*supra*), Judge Frank writing for the Court specifically reversed a District Court decision which refused to consider a pre-indictment suppression application of a confession. The reasoning of that case has been followed and adapted in at least two succeeding decisions from other Circuits.

In *Austin* v. *U. S.*, 297 F2d 356 (4 Cir. 1961), Chief Judge Sobeloff, writing for the Court, specifically recognized Rule 41(e) as providing a remedy pre-indictment for Fourth or Fifth Amendment violations.

In *Smith* v. *Katzenbach*, 35 F2d 810 (D.C. Cir. 1965), petition for re-hearing en Banc denied October 26, 1965, the Court recognized the right to a pre-indictment suppression application under Rule 41. In doing so, the Court relied on *Fried* and *Austin* (*supra*) and stated on page 814 that Rule 41 is a crystalization of the principal of equity jurisdiction. This is exactly what we urged upon the District Court, upon the Circuit Court and upon this Court.

The second contention of the Government, i.e., their reliance on *Calandra* (*supra*), we submit is misplaced. As indicated in our petition in chief, the footnote in *Calandra* (*supra*) excludes its applicability to electronic interception by virtue of the specific Congressional prohibition.

Calandra (*supra*) did not attempt to rule on the applicability of a pre-indictment application pursuant to

Rule 41(e) per se. It determined that material seized as a result of an unlawful physical search still could be presented to a grand jury.

As previously indicated, it did not effect the specific prohibitions of Title 18, United States Code, Section 2515 and thus left as viable the exclusion of unlawfully seized electronic material. Therefore, it follows that Rule 41(e) which has been historically the method for enforcing an individual's rights against an unlawful seizure remains as a vehicle for enforcing the rights created under the still viable Section 2515.

In passing, it should be noted that the statement on page 1, paragraph 2 of the Government's reply to the effect that the conversations in a private room were recorded is not in fact the situation. According to a statement by the Assistant United States Attorney before the District Court Judge, the devices were placed in booths in corners of the public portions of the bar apparently to intercept conversations of whomever would utilize those public areas.

In summary, it is submitted that in light of the rather wide use of electronic interception, the specific expression of Congressional skepticism concerning same and the viable existence of 41(e), a statement is required from this Court as to whether 41(e) is still available for pre-indictment suppression motions of illegally seized oral communication.

Respectfully submitted,

GUSTAVE H. NEWMAN
Attorney for Petitioners
522 Fifth Avenue
New York, New York 10036
Telephone: (212) MU 2-4066